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# Appendices

*Comments of COMSAT Corporation*
*In the Matter of Direct Access to the*
*INTELSAT System*

*IB Docket No. 98-102*
*File No. 60-SAT-ISP-97*

*December 22, 1998*

# COMMENTS OF COMSAT CORPORATION

**In the Matter of Direct Access to the INTELSAT System**
IB DOCKET No. 98-102, File No. 60-SAT-ISP-97
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## APPENDICES

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## Statutory Analysis

# THE FCC Lacks The Statutory Authority to Permit Level 3 Direct Access to the INTELSAT System

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# The FCC Lacks the Statutory Authority to Permit Level 3 Direct Access to the INTELSAT System

With the Communications Satellite Act of 1962, P.L. No. 87-624 ("Satellite Act" or "Act"), Congress responded to President John F. Kennedy's call for a new U.S. private entity to initiate the creation of the first worldwide commercial satellite system. The Satellite Act was an unusual law—unique in its time—because Congress mandated the establishment of a private, for-profit corporation now known as COMSAT Corporation ("COMSAT") to implement particular national policy objectives.[1]

This analysis considers whether the Satellite Act would allow the Federal Communications Commission to order "Level 3 direct access" to the satellites of the International Telecommunications Satellite Organization ("INTELSAT").[2] Application of the traditional tools of statutory construction demonstrates that the Satellite Act plainly defines COMSAT's relationship to that first global system and the corporation's role in dealing with U.S. users of that system. Because the administrative agency did not establish that relationship, it has no power to substitute its own preferences for what

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[1] 47 U.S.C. §§ 701, 721.

[2] *Direct Access to the INTELSAT System*, IB Docket No. 98-192, File No. 60-SAT-ISP-97, FCC 98-280, ¶ 15 (rel. Oct. 28, 1998) (Notice of Proposed Rulemaking) ("*Notice*") (calling for comment on "implementing Level 3 contractual direct access"). The *Notice* envisions that U.S. customers would deal directly with INTELSAT to obtain capacity. *Id.* at ¶ 8. While these customers would place their orders with and make utilization payments directly to INTELSAT, COMSAT would remain liable for satisfying U.S. investment and other treaty obligations to the intergovernmental satellite organization.

Congress decided. Lawmakers intentionally designed COMSAT to be the sole and independent provider of services to U.S. users via the global system, not merely one of several fungible common carriers using the system, nor a financing shell to be exploited or bypassed by other carriers. The FCC therefore lacks authority to adopt its proposal for direct access.

As set forth in detail below, the 87th Congress deliberately conferred a comprehensive set of rights and obligations on COMSAT, with individual elements operating together to achieve lawmakers' goals. Foremost among these statutory rights is COMSAT's exclusive franchise over the provision of INTELSAT services to U.S. users. Congress understood that this right would be a primary safeguard against potential anticompetitive abuses of the new global system by the then-dominant U.S. international carrier, AT&T. Lawmakers also recognized that COMSAT's exclusive role would provide the best guarantee that INTELSAT capacity would be offered to all U.S. users on a fair and nondiscriminatory basis. In keeping with this congressional intent, COMSAT has been the only U.S. entity authorized to provide services via the INTELSAT system since the launch of its first satellite in 1965.

The language and overall framework of the Satellite Act provide abundant confirmation of lawmakers' intentions for their "chosen instrument" for U.S. participation in the global system: "The purpose of the legislation is to bring into being *a* private corporation which would be *the* U.S. participant in a global satellite communications system."[3] The Act authorizes the creation of "a communications satellite

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[3] *See* Satellite Act; Report of the House Comm. on Interstate and Foreign Commerce, (Continued...)

corporation for profit."[4] The statute goes on to enumerate in detail the obligations and rights of the new entity which Congress thought necessary to ensure that global satellite services were delivered to U.S. users in a nondiscriminatory manner. Had lawmakers not intended to confer this special institutional status on COMSAT, Congress would not have written the statute as it did. In particular, if the Satellite Act permitted non-exclusive access, there would have been no need for the explicit safeguards to assure that the *one* "participant" would treat all users fairly:

- Special emphasis on COMSAT's nondiscrimination obligation.
- Particular emphasis on COMSAT's unique role as a "carriers' carrier."
- Detailed restraints on carrier ownership and board representation to prevent AT&T from misusing its market power (it then held a 90% monopoly in the U.S. international marketplace) to harm existing rivals or suppressing the development of satellite technology.

These provisions contrast sharply with other sections of the statute that explicitly provide for multiple entities to participate in certain aspects of the global system:

- Earth station ownership and operation.

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Communications Satellite Act.of 1962, H.R. Rep. No. 1636, 87th Cong., 2d Sess. at 7 (Apr. 24, 1962) (emphasis added). *See also, Comsat Study—Implementation of Section 505 of the International Maritime Satellite Telecommunications Act*, 77 F.C.C.2d 564, 581 (1980) ("Comsat is ***endowed*** with extraordinary powers and privileges as the U.S. 'chosen instrument' for establishment of the global system envisaged by the 1962 Satellite Act."); Implementation of Section 505 of the International Maritime Satellite Telecommunications Act, 74 F.C.C.2d 59, 64 (1979) ("The 1962 Communications Satellite Act... place[s][a] specific obligations and responsibilities on Comsat as the chosen instrument of the United States to participate in international cooperative ventures for the establishment of global communications satellite systems.").

[4] 47 U.S.C. § 731.

- Procurement of equipment.
- Potential development of rival satellite systems.

The statutory history also demonstrates that lawmakers expected and desired that the new entity would have an exclusive franchise over the provision of INTELSAT services. Indeed, this understanding permeated Congress' conception of the proposed alternatives as well, which is why lawmakers considered the need for the same key safeguards under all scenarios: the obligation to provide service in a nondiscriminatory manner and the requirement that the entity serve as a carriers' carrier. Lawmakers expected that one entity, whatever its organizational form, would act as the sole service provider—and the safeguards that Congress devised to ensure that all eligible U.S. users could obtain transmission capacity on equitable terms work as intended only if the one provider established by the Satellite Act is the one provider of the global system's services.

Perhaps the best articulation of this understanding came from the then-chairman of the Federal Communications Commission. Approximately one week before passage of the Satellite Act, Newton Minow testified before the lawmakers that

> [i]t is important to remember that in this respect the satellite corporation is a common carrier's common carrier. It will make available its relay facilities—the satellite and any ground terminals which it operates—to the international carriers, both foreign and United States....To communicate by satellite, the foreign entity must have a ground station and must obtain capacity in the satellite facilities. The U.S. carrier must also obtain capacity in the satellite system. *Such capacity must be obtained, of course, from the satellite corporation.*[5]

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[5] *Communications Satellite Act of 1962: Hearing on H.R. 11040 Before the Senate Comm. on Foreign Relations*, 87th Cong., 2nd Sess. 20 (1962) ("*1962 Senate Foreign Relations Hearings*") (emphasis added).

Similarly, in a letter to then-Senate Majority Leader Mike Mansfield, incorporated into the same hearing, the FCC Chairman explained that

> the market to be served by the corporation consists of the carriers who will use its facilities. The market to be served by the carriers will be the senders and recipients of communications traffic. *The corporation will depend upon the carriers for its revenues; the carriers will depend upon the corporation for facilities*. Thus, this will not be a situation in which one enterprise is motivated to control another enterprise in order to stifle competition, to the public detriment. On the contrary, the interest of the carriers will lie in promoting the success of the corporation, thereby promoting their own success, with resulting benefits to the public.[6]

As demonstrated below, a Commission order implementing Level 3 direct access would render many of the Satellite Act's provisions nonsensical or absurd. A reviewing court would reject such a result, and the analysis here lays bare the *Notice's* radical misreading of the statute.

## I. The Text, Structure, and Legislative History of the Satellite Act Establish COMSAT as the Exclusive U.S. Participant in INTELSAT, With Sole Authority to Provide INTELSAT Services to U.S. Customers

Because the Commission's proposal for mandating Level 3 direct access is directly at odds with the Satellite Act, any FCC order adopting that proposal would exceed the agency's delegated authority under the statute.[7] "It is axiomatic that an administrative agency's power

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[6] *1962 Senate Foreign Relations Hearings* at 27 (quoting Letter of Newton Minow to Sen. Mike Mansfield, Senate Majority Leader).

[7] The *Notice* repeats an assertion in the Commerce Comm. Report to H.R. 1872—a measure that died in the last Congress — that "the FCC has the current authority to institute direct access." *Notice* at n.55. It is axiomatic, of course, that the "legislative history" of unenacted bills cannot take precedence over the language and legislative history of the existing statute. *See* 2A N. Singer, Sutherland on Statutory Construction at 48.10 pp. 319 and 321, n.11 (4th ed. 1984); *Pierce v. Underwood*, 487 U.S. 552, 566 (1988) ([I]t is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say

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to promulgate legislative regulations is limited to the authority delegated by Congress."[8] Consequently, agency action "is always subject to check by the terms of the legislation that authored it; and if that authority is exceeded it is open to judicial review."[9]

The *Notice* suggests that the FCC might base its alleged authority to overturn nearly 40 years of consistent adherence to the statutory scheme on a few discrete passages of the Satellite Act—and the lack of certain words that the agency might (after 36 years of hindsight) find dispositive.[10] Such a "mechanical reading" that fails to examine the literal words in view of the language and structure of the Act as a whole is insufficient.[11] As a matter of statutory construction, the FCC may not wrench discrete clauses of the Satellite Act out of context, and thereby interpret the Act to produce "a result demonstrably at odds with the intent of

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what an enacted statute means."); *Colorado Nurses Assoc v. Federal Labor Relations Auth.*, 851 F.2d 1486, 1490 (D.C. Ct. App. 1988) ("A law may be amended, superseded, or rescinded by another law, but not by legislative history"); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("subsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress") (internal citations omitted).

[8] *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1998); *see also Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d at 151, 161 (4th Cir. 1998) ("[A]gency power is 'not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'") (quoting *Manhattan General Equipment Co. v. Commission*, 297 U.S. 129, 134 (1936).

[9] *I.N.S. v. Chadha*, 462 U.S. 919, 953 n.16 (1983); *id.* at 955 n.19.

[10] *Notice* at ¶ 24 ("The Act's authorization of COMSAT to undertake certain activities, including furnishing 'for hire channels of communication' to U.S. customers, is not, however, expressed in terms of exclusivity.").

[11] *Brown & Williamson*, 153 F.3d at 163-64.

Congress."[12] Rather, statutory language must be read with common sense to avoid absurd results—and to accord with a holistic understanding of lawmakers' objectives and policy as embodied within the statutory scheme and the legislative history.[13]

In earlier submissions in FCC File No. 60-SAT-ISP-97, COMSAT already has demonstrated that the legislative language is plain: The language, structure, and context of the Act demonstrate that Congress vested COMSAT with an exclusive franchise to provide services via the INTELSAT system to U.S. users.[14] The detail and cohesiveness of this regulatory scheme, summarized below, is indisputable—and clearly demonstrates that Congress pervasively regulated the manner in which "the corporation" would directly "furnish" INTELSAT capacity to U.S. users because that new entity was to be the *only* provider of the global system's services.[15] *If Congress had intended that any number of independent U.S. carriers be allowed direct access to INTELSAT, it would have been pointless and, indeed, absurd for lawmakers to impose this statutory framework on COMSAT alone but remain silent*

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[12] *Id.* at 162 n.10 (citations omitted).

[13] *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994); *Dunn v. Commodities Future Trading Commission*, 117 S. Ct. 913, 917 (1997) (courts guided by policy result sought by Congress), *Trans-Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978). *See also Gustafson v. Alloyd Co.*, 513 U.S. 561, 568-570 (1995) (subsequent history omitted) (courts look to overall structure of legislation).

[14] COMSAT Corporation, "An Analysis of the FCC's Authority to Mandate 'Direct Access' to the INTELSAT System," March 2, 1998 (Revised Edition) at 3 ("COMSAT Brief Analysis"). The COMSAT Brief Analysis was originally submitted in FCC Docket No. 60-SAT-ISP-97 on December 24, 1997, in a somewhat shorter form. The statutory analysis provided in this submission comports with that of COMSAT Brief Analysis—but this document provides considerably more detail and statutory history.

[15] *Id.* at 7.

*with respect to other potential providers of the U.S. space segment*. Similarly, if the Satellite Act permitted the new global system to provide services directly to U.S. carriers, it would have been absurd for Congress to limit the statute's various regulatory requirements only to COMSAT. The FCC's *Notice* fails to address these anomalies, relying instead on the statute's lack of an express bar to Level 3 direct access.[16]

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By its terms, the Act grants only COMSAT the right to "furnish, for hire, channels of communication to United States communications common carriers and to other authorized

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[16] The *Notice* also claims that the legislative history reveals no express "requirement" that COMSAT alone provide services via the as-yet-unbuilt global system, but points to only a few of the many congressional committee reports and none of the Hearings on the legislation. *See Notice* at ¶ 25 & n.78. As demonstrated herein, the *Notice* missed the voluminous history to the contrary. *See, infra,* Section I.A.2.

Moreover, the chronology of COMSAT and INTELSAT themselves rebut the agency's tentative conclusion. The Satellite Act was drafted and enacted well before the United States made efforts to organize INTELSAT—or even determined that the creation of an international governmental organization ("IGO") would be appropriate. For that reason, the text of the Satellite Act reflects lawmakers' efforts to provide the flexibility to permit COMSAT *itself* to serve as the organizational entity for the global system if developments warranted it. *See* 47 U.S.C. § 735(a) (authorizing COMSAT to own and operate the as-yet-unbuilt satellite system "itself" and to lease capacity on that system to both "foreign and domestic" entities). Indeed, lawmakers were not sure what organizational form the new global system itself would take even two years after the Satellite Act was enacted. *See Satellite Communications - 1964: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 88th Cong., 2d Sess. (1964) (*"1964 House Government Operations Hearings"*). For example, in that 1964 Hearing, Herbert Roback, Staff Administrator, House Military Operations Subcomm., House Comm. on Gov't Operations, queried a Commission witness as to the "status of this carriers' carrier as far as any evolution of foreign communications is concerned" and specifically as to whether "it will evolve into an international corporation." *Id.* at 338. The Chief of the FCC's Common Carrier Bureau, Bernard Strassburg, replied that "it is difficult to say what the future holds in that respect." *Id.* He noted that COMSAT "could conceivably become part of an international joint venture" or that "some ... international juridical entity" could be established in which COMSAT "would be the U.S. participant in that corporation." *Id.* As events later developed, of course, INTELSAT was formed as an international treaty-based organization.

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entities" and the power "to contract with authorized users ... for the services of the communications satellite system."[17] While the Act does not use the term "exclusive" in referring to COMSAT's right of access to the INTELSAT system, such pedantry would not have affected the plain meaning of this language when read in context.[18] First, the Act does not grant any other entities—including the statutorily defined "communications common carriers"—the right to access the new satellite system which became INTELSAT.[19] The express grant of authority to COMSAT implies the lack of such authority for other entities.

Second, the Commission concedes that the adjacent provision of the statute granting COMSAT the power to "plan, initiate, construct, own, manage, and operate" the new satellite system vests COMSAT with the *exclusive* right to do so.[20] That is so because the statute makes COMSAT the sole U.S. participant in the satellite system. Because the FCC concedes that the one provision grants an exclusive franchise, it must conclude that the similarly worded adjacent

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17 47 U.S.C. §735(b)(4).

18 Moreover, the text of the Act consistently distinguishes between COMSAT as "the corporation" through which U.S. participation in direct relationships with the global system is to occur and the international carriers as "carriers" who are the corporation's customers. *See, e.g.*, 47 U.S.C. §§ 733(a), 735(a)(2), 721(c)(2). This distinction is perhaps most starkly obvious in the provision giving the FCC authority to license earth stations "*either* to the corporation *or* to one or more authorized carriers *or* to the corporation and one or more such carriers *jointly*." 47 U.S.C. § 721(c)(7) (emphasis added). There would be no purpose for such distinctions if COMSAT were to be treated as just another U.S. carrier.

19 47 U.S.C. §§702(6), 701(c).

20 *Notice* at 22.

provision also grants an exclusive franchise. Any other conclusion would be unreasonable and contrary to law.

Moreover, the Satellite Act is a comprehensive scheme that details when competition will be permitted and when it will not. The express statutory mandate of competition in other operations of the new satellite system demonstrates the exclusivity of COMSAT's access to the new satellite system's space segment.[21] Congress encouraged competition in earth station ownership and operation, the procurement of INTELSAT related equipment, and even the potential development of rival satellite systems.[22] In addition, the ownership provisions designed to ensure COMSAT's operational independence from its carrier-customers make no sense if COMSAT does not have an exclusive franchise over access to the INTELSAT system.[23]

That the Satellite Act does not permit the Commission to order Level 3 direct access is confirmed by the fact that such a result would have undermined the two central purposes of the Act: construction of the world's first global communications satellite system and the nondiscriminatory provision of service from that system to U.S. common carriers. Similarly, the Act's express regulation of COMSAT as a common carrier in the provision of access to the INTELSAT system—while making no mention of the regulatory status of common carriers doing the same—shows that COMSAT alone was granted that access.[24]

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21 47 U.S.C. §701(c); *see infra* at Section I.B.1.

22 47 U.S.C. §701(d); *see infra* at Section II.

23 47 U.S.C. §733(a); *see infra* at Section I.B.2.e.

24 47 U.S.C. §741; *see infra* at Section II.

Finally, the FCC's reading of the Act creates a glaring anomaly. The statute expressly contemplates the possibility that COMSAT would have had to build and own the new satellite by itself—but in those circumstances the entire concept of direct access would have been meaningless.[25]

* * *

The *Notice* fails to accord the plain meaning of the actual language to the provisions in question—and, moreover, fails to complete the standard task of considering those provisions within the Satellite Act as a whole, including its statutory history. The Supreme Court reiterated just months ago that "context counts, and [we] stress in this regard what the Court has said '[o]ver and over': 'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and polity.'"[26] Thus, the *Notice* essentially ignores the Supreme Court's directive that "[s]tatutory construction ... is a holistic endeavor."[27]

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[25] 47 U.S.C. §735(b); *see infra* at Section II.

[26] *Regions Hospital v. Shalala,* 118 S. Ct. 909,917 at n5, (1998) *quoting United States National Bank of Or. v. Independent Insurance Agents of America Inc.* 508 U.S. 439, 455, (1993); *accord Robinson v. Shell Oil Co.,* 117 S. Ct 843, 846 (1996) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used and the broader context of the statute as a whole."); *Gustafson,* 513 U.S. 561, 570 (acts of Congress "should not be read as a series of unrelated and isolated provisions."); *United States v. Nordic Villages, Inc.* 503 U.S. 30, 36 (1992) (noting the "...well settled rule that a statute must, if possible, be construed in such fashion that every work has some operative effect."); *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989); *Kmart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988); *United Savings Assoc. of Texas v. Timbers of Inwood Forest Assoc. Ltd.,* 484 U.S. 365, 371 (1987) ("Statutory construction is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme..."). *See also Brown & Williamson*, 153 F.3d at 162 (noting the crucial role of context as a tool of statutory construction).

This holistic approach is particularly crucial when "a contrary interpretation" of a statute "would have profound consequences.... Absent any indication that Congress intended such far-reaching consequences," such readings are disfavored.[28] Moreover, when an agency asserts new-found authority to order changes of such magnitude, "courts should perform a close and searching analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue."[29]

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[27] *United Savings*, 484 U.S. at 371 (provision that may seem ambiguous or anomalous in isolation is "often clarified by the remainder of the statutory scheme"); *see also, Robinson*, 117 S. Ct. 843, 846 (1997) (statutory language must be examined by "reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); *Gustafson*, 513 U.S. 561, 570 (1995) (acts of Congress "should not be read as a series of unrelated and isolated provisions").

[28] *Morash*, 490 U.S. 107, 118-119 (1989).

[29] *Brown & Williamson*, 153 F.3d at 162 ("ascertaining congressional intent is of particular importance where, as here, an agency is attempting to expand the scope of its jurisdiction"); *ACLU v. FCC*, 823 F.2d 1554, 1567 n. 32 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). *See also, e.g., Hi-Craft Clothing Co. v. N.L.R.B.*, 660 F.2d 910, 916 (3rd Cir. 1981) (1981) ("The more intense scrutiny that may be appropriate when the agency interprets its own authority may be grounded in the unspoken premise that government agencies have a tendency to swell, not shrink, and are likely to have an expansive view of their mission."); *Fed. Maritime Commission v Seatrain Line, Inc.*, 411 U.S. 726, 745 (1973) ("an agency may not bootstrap itself into an area in which it has no jurisdiction").

Moreover, if an agency's statutory interpretation "would produce a result demonstrably at odds with the intent of Congress ... the intent of Congress rather than the strict language controls." *Brown & Willamson*, 153 F.3d at 162 n.10 (citing *Maryland State Department of Education v. Department of Veterans Affairs*, 98 F.3d 165, 169 (4th Cir. 1996) (quoting *United States v. Ron Pair Entertainment, Inc.*, 489 U.S. 235, 242, *cert. denied*, 118 S. Ct. 43 (1998)); *Brown & Williamson*, 153 F.3d at 162 (citing *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843 n. 9 (1984)) ("If the court can ascertain Congress' intent on a particular question by applying the traditional rules of statutory construction, then it must give effect to that intent.").

In sum, the starting point for ascertaining congressional intent begins not simply with the language of particular provisions of the statute, but also must include the overall statutory scheme and context. This should be accomplished with the further aid of legislative history, contemporaneous construction, and consideration of other relevant statutes.[30] As set forth below, each of these traditional tools—the language and structure of the Satellite Act, its context and statutory history, relevant actions by Congress since the passage of the Act, and pertinent decisions of the Commission and the federal courts—establishes that an FCC order permitting Level 3 direct access would be unlawful.

The discussion below examines in detail the events surrounding the passage of the Satellite Act, as well as subsequent statements and actions by the courts, Congress, and the agency. "These individual events are like pieces of a puzzle in that no single event is outcome determinative. However, when viewed as a whole, it is clear that Congress did not intend to give" the Commission power to remove a key linchpin of its carefully constructed legislative scheme.[31]

### A. The history of the Satellite Act reveals that the entire statute is constructed around the assumption that COMSAT has the exclusive franchise to provide services via the first global satellite system

The relevant time for determining the meaning of a statute is at the point of enactment.[32] Given the misreading of the law reflected in the *Notice,* a careful review of the

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30 *See, e.g., Atherton v. FDIC*, 519 U.S. 213 (1997); *Offshore Logistics v. Tallentire*, 477 U.S. 207 (1986); *United States v. Stewart*, 311 U.S. 60, *reh'g denied*, 311 U.S. 729 (1940).

31 *Brown & Williamson*, 153 F.3d at 167.

32 *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 228 (1994).

congressional hearings and debates that led to the Satellite Act proves instructive—particularly with respect to the understandings and assumptions that lawmakers and others brought to the topic of satellite communications. The history of the Satellite Act reveals that every major decision made by Congress in crafting that Act was premised on the assumption that the U.S. participant would have exclusive access to the new system. Everyone understood that:

- While Congress considered three alternatives as the vehicle for U.S. participation in financing, building, operating, and accessing that system—a carrier consortium, a government entity, or COMSAT—all agreed that the U.S. participant would have exclusive U.S. access to the new satellite system.

- The new system itself, as the world's first commercial satellite network, would be in one sense a "monopoly" until a possible rival system emerged.[33]

- Granting the U.S. participant an exclusive right to offer services via the first satellite system would afford it control over the U.S. market for international satellite communications.

- This status required the establishment of safeguards designed to foster greater competition by ensuring the new entity's development as an independent transmission alternative to the transoceanic cables owned by the existing carriers. Lawmakers therefore made clear that COMSAT would function primarily as a carriers' carrier; COMSAT would be required to provide nondiscriminatory access to the satellite system for U.S. carriers, including the owners of rival undersea cables; limits on carrier ownership would protect COMSAT's operational independence from its customer/rivals; and competition would be explicitly permitted in as many aspects of the new satellite system as possible.

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[33] *See, e.g., Communications Satellite, Part 1: Hearings Before the House Comm. on Interstate and Foreign Commerce*, 87th Cong., 1st Sess. at 139 (1961) (*"1961 House Interstate and Foreign Commerce Hearings"*) (statement of Lee Lovinger, Assistant Attorney General, Antitrust Division, U.S. Department of Justice).

### 1. President Kennedy envisioned a global satellite system serving several policy goals—including nondiscriminatory provision of service to U.S. users and financing by private enterprise independent of the existing U.S. international carriers

The process of enacting the Satellite Act began in July 1961, when President Kennedy issued a public statement calling for U.S. leadership in the creation of an international satellite communications system—and urged that the U.S. portion of the system be privately owned and operated.[34] The President's proposal envisioned a global system serving several policy goals at the same time. These goals included:

- Developing a commercial satellite system for international communications "as expeditiously as practicable."[35]

- Improving global communications worldwide, particularly in less developed countries. This objective was akin to the goal of universal service on a global basis.[36]

- Demonstrating the benefits of a free-market system to other nations by establishing a private entity, rather than a government agency, to provide the satellite service to U.S. users. This goal also served two domestic objectives—investment of private shareholder capital would avoid the need for public funding and also allow those Americans who took the risk of purchasing stock to earn a return if the company succeeded.[37]

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[34] *See* Communications Satellite Policy, Presidential Press Release (July 14, 1961) [draft] (Statement of President on Communications Satellite Policy, 1961 Pub. Papers 529).

[35] *Id.*

[36] *See* Report of the Military Operations Subcomm. of the House Comm. on Government Operations, *Satellite Communications: Military-Civil Roles and Relationships*, 88th Cong., 2d Sess. at 46 (Subcomm. Print, 1964) ("1964 House Military Operations Subcomm. Report") (noting "congressional declaration of policy and purpose that the [new commercial satellite] system is to be global in extent and universal in service").

[37] Letter from the President to the President of the Senate, Presidential Press Rel. (Feb. 7, 1962).

- Fostering intermodal competition in the international telecommunications marketplace, which policymakers expected would eventually lead to lower prices for services.[38]

In response to President Kennedy's call for action, lawmakers drafted a flurry of bills. Although numerous, the measures each embodied one of three models noted above for structuring the U.S. participant: (1) a consortium of the existing international carriers, (2) a new government agency, and (3) the Administration's general proposal for a new private corporation with a unique mix of commercial and policy functions.[39] Each of these models would have granted the participant exclusive access to the new satellite system. Six congressional committees held ten sets of hearings on satellite telecommunications over the course of a year, and extensive debates took place on the floors of both houses of Congress.[40]

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[38] As the President noted upon signing the legislation that became the Satellite Act, "[t]he benefits which a satellite system should make possible within a few years will stem largely from a vastly increased capacity to exchange information cheaply and reliably with all parts of the world by telephone, telegraph, radio and television.... Better and less expensive communications, like better and less expensive transportation, are vital elements in the march of civilization." Office of the White House Press Secretary, Remarks of the President Upon the Signing of H.R. Res. 11040, The Communications Satellite Act of 1962, in the President's Office (rel. Aug. 31, 1962) ("President's Aug. 31, 1962 Remarks").

[39] *See, e.g.*, S. 2890, 87th Cong., 2d Sess. (1962) (proposing government ownership); S. 2650, 87th Cong., 2d Sess. (1962) (proposing carrier joint venture); H.R. Res. 11040, 87th Cong., 2d Sess. (1962) (Kennedy-initiated proposal ultimately adopted as the Satellite Act).

[40] *See, e.g., Hearings on S. 2650 and S. 2814 Before the Senate Space Comm.*, 87th Cong., 2d Sess. (1962) ("1962 Senate Space Hearings"); *Communications Satellite Legislation: Hearings on S. 1680 and S. 2814, Amendment Before the Senate Comm. on Commerce*, 87th Cong., 2d Sess. (1962) ("1962 *Senate Commerce Hearings*"); *Hearings on H.R. 10115 & 10138 Before the House Commerce Comm.*, 87th Cong., 2d Sess. (1962) ("*1962 House Commerce Hearings*").

As demonstrated below, the legislative record makes clear that Congress intentionally established COMSAT as the exclusive provider of INTELSAT space segment services to U.S. customers, as well as the sole direct U.S. investor in the global system. Had this not been the intended result, lawmakers would not have drafted the Satellite Act with the degree of specificity that they did—and certainly would not have devoted so much detailed attention to the ownership, structure, and operation of the designated U.S. participant.[41]

### 2. Every proposal considered by Congress concerned a "monopoly" in the sense that the new U.S. satellite entity, whatever its ownership structure, would be the sole supplier of services in the United States via the new global system

A discussion of the legislative history of the Satellite Act includes references to a "monopoly" because the issue involved the creation of the world's first commercial satellite system at a time when only limited copper transoceanic cables were deployed. While the term "monopoly" does not appear in the Satellite Act, it is used extensively throughout the congressional deliberations leading up to enactment. Within the context of the deliberations in 1961-62, it is clear that the common understanding of the term—the exclusive right to sell a particular commodity—precisely describes what Congress gave to COMSAT.[42] Indeed, selling

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[41] In contrast to their understanding of how COMSAT was to function with respect to U.S. users, lawmakers were not nearly so sure what organizational form the new global system itself would take. *See supra* Section I.A.2.

[42] The term "monopoly" generally means "the exclusive right (or power) to carry on a particular business or trade, manufacture a particular article, or *control the sale of the whole supply* of a particular commodity." *Black's Law Dictionary*, 1007 (4th ed. 1951) (emphasis added).

the commodity that has since come to be called INTELSAT "space segment" is at the core of COMSAT's purpose under the statute.[43]

As discussed below, however, provisions within the Satellite Act itself make clear the absence of any congressional intent to confer on the new entity exclusive rights over all international communications facilities (*e.g.*, the Act does not authorize COMSAT to build and operate undersea cables) or even future exclusivity over all global satellite services.[44] Rather, Congress conferred a monopoly role on COMSAT in the sense of conferring exclusivity with respect to its provision of INTELSAT services—recognizing that the so-called monopoly over international satellite services would disappear if other satellite systems separate from INTELSAT later emerged as competitors.

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[43] Yet, as discussed further below, lawmakers' references did not mean that they intended the entity to have a future monopoly over all international facilities-based services or even a monopoly over all global satellite services. Rather, Congress conferred a monopoly role on COMSAT with respect to its provision of INTELSAT services—but recognized that the so-called "physical" monopoly over satellite services would disappear if other global satellite systems emerged later. *See Communications Satellite Act of 1962: Hearings on H.R. 11040 Before the Senate Committee on Foreign Relations*, 87th Cong., 2d Sess. At 32 *("1962 Senate Foreign Relations Comm. Hearings")* (quoting Letter of Deputy Attorney General Katzenbach to Senate Majority Leader Mansfield) ("the proposed corporation under the pending bill will certainly not be a monopoly in the accepted and invidious sense of an enterprise which enables its owners to dominate and exploit a market. The important objective with respect to a communications satellite system is to make sure, as the pending bill does, that the system will not be controlled by a favored few but rather will reflect broadly the interests of all those who are concerned with the system, whether as communications carriers, manufacturers and suppliers, investors, or citizens and taxpayers.").

[44] The FCC has recognized that, in today's competitive industry, COMSAT does not have a monopoly in an economic sense; the corporation obviously is not the sole source of international facilities-based services to and from the United States. *Non-Dominance Order*, 13 F.C.C. Rcd 14083 (1998).

Furthermore, lawmakers understood that they were creating an exclusive provider of satellite capacity to U.S. users no matter which course they pursued. As a congressional witness succinctly testified in 1961, before any specific proposal was introduced, the owner/operator of the "first satellite system" would have "a monopoly in the sense that he will be the sole *seller* of satellite communication services. The crucial question—one that has given rise to no little controversy here in Washington—is 'who shall be allowed to exercise this monopoly privilege?'"[45]

The legislative history reveals a wide consensus that the world's first commercial satellite system would be a "natural monopoly," as the then widely accepted antitrust concept was understood.[46] While the natural monopoly theory has become largely passé today, lawmakers in 1961-62 took as a given that "[t]he public interest requires that, if there be only enough business to support operation by one licensee, there must be only one license. This is a commonplace of public utility regulation."[47] With respect to the envisioned satellite system,

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[45] *Space Satellite Communications: Hearings Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business*, 87th Cong., 1st Sess. at 89 (1961) ("*1961 Senate Small Business Hearings - Part 1*") (Testimony of Leland Johnson, Chief Economist, Rand Corporation) (emphasis added).

[46] *See 1961* House *Interstate and Foreign Commerce Hearings* at 139 (Testimony of Lee Loevinger, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice). ("The antitrust law, in effect, prohibits economically created monopolies. It does not, and I think cannot, prohibit physical monopolies. Beyond this, the antitrust laws would say that whatever natural monopoly is inherent in the conditions with which you are presented should not be permitted to be taken advantage of by a private enterprise to extend its monopoly power beyond the limits inherent in the natural conditions.").

[47] *Communications Satellite, Part 1: Hearings Before the House Comm. on Science and Astronautics*, 87th Cong., 1st Sess. at 359 (1961) ("*1961 House Science and Astronuatic Hearings - Part 1*") (quoting *Delta Air Lines, Inc. v. C.A.B.* 275 F.2d 632, 637 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 969 (1960)); *see also, id.* at 349 (quoting *RCA*

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the technical constraints of the time also led lawmakers to believe that the global system would be unique for some time to come—which, in fact, was the case for two decades.[48]

Nonetheless, even in 1961-62, Congress understood that this natural monopoly would not confer *true economic* monopoly power on the new entity within the marketplace. Transoceanic transmission facilities largely owned by AT&T already existed, and breaking that facilities-based monopoly was a driving motivation for many members of Congress.[49] Lawmakers also knew that they were debating only the exclusive franchise over services provided via this first satellite system, not other systems that were to come.[50] Accordingly, while the concept of government-conferred exclusivity generally was disfavored, Congress "could determine that the creation of a monopoly in this instance would be in the interests of the public."[51]

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*Communications v. F.C.C.*, 201 F.2d 694, 697 (1964) (subsequent history omitted) ("the Communications Act does not evidence Congress' belief 'that two radio telegraph circuits are necessarily better than one' [because] '[s]uch a belief would be as strange as a belief that two telephone systems, or two railroads, are necessarily better than one'").

[48] *See 1962 House Foreign Commerce Hearings* at 473 (Statement of Under Sec. of State for Political Affairs, George C. McGhee) ("What we envisage here is not only the desirability, but, indeed, necessity, of there being but one system, a world monopoly.... [O]ne is quite capable of handling the traffic, according to the best available information, and if there were others—there would be competition as between frequencies and orbits services which would be very confusing.").

[49] *See infra,* Section I.A.5.

[50] *See id.*

[51] *1961 House Science and Astronautic Hearings - Part 1* at 551 (statement of Rep. Joseph E. Karth).

The only question to be resolved then, was the organizational nature of this satellite service provider. Both the Kennedy Administration and the Federal Communications Commission favored purely private ownership, albeit with different ownership limitations. On behalf of the Administration, Attorney General Robert Kennedy explained that "there can be only one American participant just as, in all probability, there will be only one commercial communications system using satellites. In that sense, at least, this legislation proposes a national monopoly."[52]

The existing U.S. carriers and their supporters—a group that initially included the Federal Communications Commission—also sought a monopoly, albeit one owned by the carriers.[53] For example, the American Telephone & Telegraph Corporation ("AT&T") sought to have "responsibility for establishment, ownership, and operation ... placed where it belongs—with the carriers responsible to the public for service."[54]

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[52] *1962 House Foreign Commerce Hearings* at 564 (1962). The legislative history demonstrates that the event beyond "the foreseeable future" which could end the new entity's so-called monopoly was the appearance of "other systems." *Antitrust Problems of the Space Satellite Communications Systems, Part 1: Hearings on S. 258 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. at 60 (1962) ("*1962 Senate Judiciary Hearings -Part 1*") (Testimony of Nicholas deB. Katzenbach, Deputy Attorney General, U.S. Dep't of Justice). *See also, e.g.*, 108 Cong. Rec. 15,207, 15,334 (1962) (Floor statement of Sen. Frank Church) ("certainly this enabling legislation should not preclude the establishment of alternative systems, whether under private or public management").

[53] *1961 Small Business Hearings - Part 1* at 440 (statement of T.A.M. Craven, FCC Commissioner) (stating that foreign governments will want to deal with a U.S. monopoly, not several companies from the same country); *id.* at 612, 620 (Statement of Omar Crook, Chairman of the Ad Hoc Carrier Comm.).

[54] *Id.* at 250 (Testimony of James Dingman, Vice-President and Chief Engineer, AT&T).

But as both proponents and opponents recognized, either proposal envisioned a private entity with exclusive rights to provide satellite service on the contemplated system. The Deputy Attorney General testified that:

> We have to form a corporation here that is essentially going to be a monopoly, whether it is under a proposal Senator Kerr's bill [*i.e.*, the carrier consortium] or under the administration bill [*i.e.*, COMSAT].... I said that this would be a monopoly in the sense that there would be *one corporation engaged in the transmission of messages by satellite, perform[ing] services for all authorized communications carriers in this country* and for communications carriers abroad, subject to agreements operation.... Both bills would create a single American participant in the global communications system envisaged for the near future. We are creating here a private monopoly.[55]

Members of Congress who opposed passage of the Kennedy proposal and favored government ownership did so precisely because the resulting entity would have exclusive access to the system's capacity. Yet even these lawmakers understood that their own proposals also created such a "monopoly"—a government-owned one.[56] As Senator Ralph Yarborough said, "Technical and economic factors indicate that for the foreseeable future there will be only one satellite communications system for commercial use. For this reason it is inevitable that there will be a national monopoly in the field of satellite communications."[57]

This theme is consistent; all members of Congress understood that they were debating the creation of an entity with the exclusive right to provide services via this

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[55] *1962 Senate Space Hearings* at 388 ("Space Hearings") (Testimony of Deputy Attorney General, U.S. Dep't of Justice, Nicholas deB. Katzenbach) (emphasis added).

[56] *See* 1962 Senate Commerce Comm. Report at 51 (minority views); *see also* 1962 Senate Foreign Relations Committee Report at (minority views of Senators Morse, Long & Gore).

[57] *1962 Senate Judiciary Hearings - Part 1* at 10.

first global system.[58] Given this understanding of the 87th Congress' concept of what it was creating—whether the entity was COMSAT or not—it is plain that lawmakers intended the new entity to operate as the sole provider of satellite service for U.S. users via the as-yet-unbuilt global system. Indeed, the time and effort that lawmakers devoted to devising the Satellite Act, with its myriad details, mandates, and competitive safeguards, make sense only in light of this understanding. The Commission's proposal to strip away COMSAT's exclusive franchise, therefore, contradicts this history as well as the text of the statute.

### 3. Lawmakers determined that, whatever its ownership structure, the sole provider of the envisioned new satellite services should be required to treat its U.S. customers in a nondiscriminatory fashion

Because Congress realized that any of the new entities envisioned for providing satellite services would unilaterally control the delivery of capacity to U.S. users, lawmakers widely

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[58] *See, e.g., Communications Satellite Act of 1962: Hearings on H.R. 11040 Before the Senate Comm. on Foreign Relations*, 87th Cong., 2d Sess. 32 (1962) ("*1962 Foreign Relations Hearings*") (quoting Letter of Deputy Attorney General Nicholas Deb. Katzenbach to Senate Majority Leader Michael J. Mansfield) ("It is true that, at least for a number of years, only one commercial communications satellite system will probably be feasible. Therefore, *under any system of organization, including Government ownership, there will be only a single system for some time, and in that sense a monopoly.*") (emphasis added); *id.* at 73 (testimony of FCC Chairman Newton Minow) ("It would either be a Government monopoly or it would be a private corporation monopoly, so it does not seem to me it is helpful to use the word "monopoly." We will have that anyway."); *id.* at 297 (testimony of Sec. of State Robert McNamara) (proposals concern a monopoly "whether the corporation is publicly owned or governmentally owned"); *1962 Senate Judiciary Hearings -Part 1* at 57 (Statement of Sen. Kefauver) ("It is a question of private monopoly or Government monopoly . . . ."); *id.* at 28 (Statement of Senate Subcomm. on Antitrust and Monopoly Staff Director Bernard Fensterwald) ("The basic question is whether that should be a private monopoly or whether it should be a Government monopoly....").

agreed on the need for certain statutory safeguards to be placed on the entity's operation.[59] In testimony before the Commerce Committee in July 1961—before any specific bill had been introduced—the head of the Justice Department's Antitrust Division recommended that

> All communications common carriers should have equitable and non-discriminatory access to the system so that the public may be assured of the benefits of competition. The satellite communication system offers the possibility of increased service at lower costs and this possibility can best be realized if there is competition in the furnishing of communication service of all types. Unless all communication common carriers are permitted nondiscriminatory use of the system whether or not they participate in ownership, those excluded will be at a competitive disadvantage with companies having full use of the system.[60]

Potential customers of, and suppliers to, the new entity certainly shared that view, regardless of the ownership structure that they advocated.[61]

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[59] *1961 House Interstate and Foreign Commerce Hearings* at 134 (Testimony of Lee Loevinger, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice) ("If a single company should dominate a satellite communication system, it could not only control the type of system to be established and the use to be made of the system but it should extend its control over all forms of public communications.").

[60] *1961 House Interstate and Foreign Commerce Hearings* at 135-136 (Testimony of Lee Loevinger, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice). The Assistant Attorney General also counseled against "participation costs" being "a condition precedent to having equitable access to the system"—and pointed to the history of AT&T's development as an "analogy" with respect to the harms that such a condition could foster. *1961 House Interstate and Foreign Commerce Hearings* at 145-47 (quoting FCC Chairman Minow) ("[T]he history was, very crudely put, [problematic].... AT&T ... denied the right of a number of smaller companies to interconnect with its long-distance or long-line systems. This had the effect of handicapping the smaller companies, so that a number of them either failed or fell into the AT&T orbit.").

[61] For example, a witness for General Telephone & Electronics Corporation testified that the capacity "should be available for use by all authorized existing and future U.S. and foreign communications common carriers, without regard to their ownership of an interest in the U.S. satellite company." *1961 House Science and Astronautic Hearings - Part 1* at 75-76 (1961) (emphasis added) (statement of Theodore F. Brophy, Vice President and General Counsel, General Telephone and Electronics Corp.) (proposing that "no traffic would be originated or

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By March 1962, the Chairman of the Commerce Committee observed that "[t]hus far, everyone concedes—so far as this record is concerned—that there should be a requirement of law that everyone should have use of this facility" on a nondiscriminatory basis.[62] Moreover, this legislative history reveals that the "nondiscrimination" issue was not grounded in a fear concerning the legal ownership of the new entity but rather a fear that the entity, under its exclusive service franchise, might dole out capacity for transmissions in a manner that could undermine competition. This would not have been a concern if Congress had not intended that the new U.S. satellite entity have an exclusive franchise to provide services.

While some believed that ownership restrictions alone would be sufficient to address this concern, AT&T's rivals testified plainly that they wanted safeguards directed at the new entity's obligation to offer customers service on an equitable basis.[63]

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controlled by the satellite company, but *it would serve as a common link for communications common carriers which would be its customers....* The satellite company is thus analogous to a common terminal facility owned and operated by competing trucking companies or railroads and kept available for use by any future competing communications common carrier."). Lockheed Aircraft Corporation advocated that whatever the selected system, "it [should] be available for use on a nondiscriminatory basis (including equitable nondiscriminatory rates and tariffs). [T]he development or competition for patronage by the carriers will not be hampered in any way by their use of this conduit." *1961 House Science and Astronautics Hearings - Part 1* at 421 (comments of Lockheed Aircraft Corp.).

62 *1962 House Foreign Commerce Hearings* at 643 (statement of Rep. Oren Harris.

63 *Antitrust Problems of the Space Satellite Communications Systems, Part 2: Hearings on S. 258 Before the Senate Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. at 462, 464-65 (1962) ("*1962 Senate Judiciary Hearings -Part 2*") (testimony of Samuel M. Barr, Vice President, Western Union Telegraph Co.) ("Whoever has the ownership of it has no effect on domination. It is the use of it that really gives you domination. Whether the Government owned it or 100,000 stockholders in the United States owned it, it would not affect the ability of one to dominate this system.... [I]f cost factors
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Witnesses' unanimity on the need for an explicit mechanism to guarantee that the new U.S. satellite entity offered service on a nondiscriminatory basis prompted Congress to insert such language in all three proposals.[64]

The same understanding led Congress to take steps to structure ownership of shares in COMSAT to eliminate any potential for the new entity to discriminate against non-shareholding users. But these efforts were based on the assumption that the new entity alone would control the provision of service via the global system to U.S. users—and even AT&T expected that all users, whether shareholders or not, would have to pay "a fair rental" to the corporation for its services regardless of their ownership interest, for the "use" of the new entity's capacity.[65]

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cannot be used to compete with you, as is normally done, then I do not fear the fact that" someone else owns the stock).

[64] *1962 House Foreign Commerce Hearings* at 569 (Testimony of Robert F. Kennedy, Attorney General, U.S. Department of Justice) (agreeing "with the proviso in each of these proposals where all who are engaged in this business will have the opportunity of utilizing this facility" and that such an obligation should be "a matter of law").

[65] *See, e.g., 1962 House Commerce Hearings* at 549-50. During March 1962 Hearings on the Kennedy Administration proposal, the following exchange took place between the House Commerce Comm. Chairman and James Dingman, Executive Vice President of AT&T:

> *The Chairman*: [Y]ou think that if a carrier is not in a position to participate in the initial capital outlay of this but is in the business and can obtain approval from the Federal Communications Commission that that carrier should have the privilege of using the facilities?
>
> *Mr. Dingman*: By all means. Of course, I am assuming that that carrier would pay a *fair rental*, but they definitely ought not to be excluded because they didn't have ownership.
>
> *The Chairman*: Even though your own company, it is has an investment, part ownership, would have to pay a *reasonable rental*.
>
> *Mr. Dingman*: That is correct.

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### 4. Congress decided to make the new entity, whatever its ownership structure, operate as a carriers' carrier

The legislative history reveals a broad and consistent understanding that the proposed satellite entity—whether it took the form of a carrier's consortium, government agency, or new private corporation—would have an exclusive franchise to offer services via the global system, and that this fact, in turn, necessitated pro-competitive safeguards. In addition to the general nondiscrimination obligation that Congress agreed should be imposed on any new U.S. satellite entity, lawmakers also looked favorably on the concept of requiring the new entity to offer satellite services as a "carriers' carrier."[66] The obligation would help to ensure that the new

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*The Chairman*: For the *use* of it.

*1962 House Foreign Commerce Hearings* at 549-50 (emphasis added). Similarly, the FCC implicitly agreed that the nondiscrimination safeguard it envisioned in 1961—during a satellite inquiry proceeding that slightly predated the announcement of President Kennedy's proposal—did not mean that the new satellite entity would forego an exclusive franchise on providing service to U.S. users. *See 1961 House Science and Astronautic Hearings - Part 1* at 137-38 ("It may well be, of course, that a number of such carriers will prefer to obtain necessary capacity in satellite systems through *leasing* arrangements or some other method rather than participation in ownership through contribution of capital initially. In any event, whatever may be the composition of the communication organization owning satellite systems, the systems should be made available for use by all international telecommunication carriers on equitable and nondiscriminatory terms.") (emphasis added).

[66] The FCC itself proposed the concept—and the label—of the new entity as a "carriers' carrier" during an inquiry proceeding it conducted in 1961. While the agency originally suggested that the entity be a carrier-only consortium, it nevertheless asked "[w]hether, in light of the competitive and antitrust considerations..., such equal access and nondiscriminatory use may most effectively be achieved by requiring the operator of the satellite system to act as a common carriers' common carrier." *1961 House Science and Astronautic Hearings - Part 1* at 422-23.

entity would not use its position as the then-exclusive provider of satellite services to disrupt the competitive functioning of the "retail" market served by its carrier customers.[67]

Although the idea of specifying that the new entity's major customers were to be U.S. carriers, it was not without some antecedents. Leasing arrangements among carriers for the use of one company's facilities by another was a known and understood practice to the Commission.[68] The Justice Department also pointed to that practice as a model for the new satellite entity.[69] It should be noted that the leasing carrier in these circumstances continued to both "own" its facility and "control" its usage by those carriers who sought to lease capacity—the implication being that the concepts of ownership and control necessarily encompassed the provision of services offered via the facility.

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[67] *See* Section I.A.5. The Commission later determined that the statute did not prevent COMSAT from serving end users—but the agency only lifted its regulatory bar in conjunction with other actions to encourage more competition in the provision of earth station services. *Authorized User II*, 90 F.C.C.2d 1394 (1982). Thus, while the agency may have demurred from explicitly reaffirming its earlier determination that COMSAT had a statutorily conferred exclusive franchise over the provision of INTELSAT services, *see In re Authorized Entities and Authorized Users Under the Communication Satellite Act of 1962*, 4 F.C.C.2d 421 (1966) (*"Authorized User I"*), its 1982 order comports with its contemporaneous construction of the Satellite Act. *See id.* at 428 ("The Commission is not given authority to license any other U.S. carrier to operate the space segment of a satellite system to provide international communication service; instead, such carriers must procure the space segment facilities from COMSAT.") *See infra* Section II.

[68] *1961 House Science and Astronautic Hearings - Part 1* at 137-38 ("As the Commission is aware, carriers have frequently made their facilities available to competitors through leases as needed for operations, and also under distress conditions.").

[69] *1961 House Interstate and Foreign Commerce Hearings* at 145-47 ("[W]e believe that any telephone company in the United States should have equitable and nondiscriminatory access to a long-distance satellite communications systems, as they are entitled now to equitable and nondiscriminatory access to long-distance cable systems.").

No one in 1961-62 suggested that the carriers' carrier concept could operate as a pro-competitive safeguard if the entity's customers could bypass it to obtain service from the same transmission system. To the contrary, in testifying before the House Commerce Committee, Newton N. Minow, FCC Chairman, stated that

> *[c]oncentrating ownership and operation of the entire system in a single corporation* has advantages and we endorse the approach of [the Kennedy Administration concept] in this respect.... [T]he Corporation will not function as a conventional common carrier,... Unlike those carriers, the Corporation will not furnish service to the general public. *Its undertaking, rather, will be to furnish channels of communications to relatively few users; namely, common carriers and their foreign counterparts, who do serve the general public....* [T]he relationship between the carriers and the Corporation will differ in essential respects from the relationship between the carriers and the general public. Thus, *the carriers who will use the Corporation's facilities* may also have substantial ownership interests in the Corporation."[70]

In 1961, when championing the carrier consortium proposal, AT&T argued vociferously against the carriers' carrier concept as well as the establishment of a "new separate satellite company" to offer services.[71] AT&T contended that this entire scheme for an independent provider of satellite services would likely fail financially because "*[s]uch a company would have only a single source of revenue—the rentals from satellite circuits*. It must be recognized that there are in fact real business and economic risks involved, both in the

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[70] *1962 House Foreign Commerce Hearings* at 407 (testimony of Newton N. Minow, FCC Chairman) (emphasis added).

[71] *Id.* at 381 ("Such an intermediate 'carriers' carrier' entity, unprecedented in international communications, has never been found necessary or desirable in working out cooperative arrangements for use of facilities and *provision of overseas communications services*.") (emphasis added).

establishment of a satellite communications system and in its profitable operation especially in the earlier years."[72]

Despite (or perhaps in part because of) AT&T's protests, by April 1962 Congress insisted that the carriers' carrier concept belonged in all proposals for the new satellite entity, regardless of the form it took. As the Assistant Chief of the FCC's Common Carrier Bureau noted in his testimony before the Senate Antitrust Subcommittee,

> I think one thing should be understood in any of the bills that have been proposed, including Senator Kefauver's bill [for a new government agency], it is contemplated that this *new entity, whatever it is composed of, will furnish its facilities to the existing carriers engaged in furnishing service to the public.* In other words, these channels of communication which will be derived from the satellite system will be used in a parallel manner by the carriers with their existing cable and radio facilities to furnish service.... [The new entity] will be a wholesaler of channels to the existing carriers. That, I think, is the concept inherent in any of the bills that have been mentioned.[73]

Lawmakers in 1961-62 perceived the carriers' carrier concept as an important means of guaranteeing that the entity operated as an independent, disinterested provider of equivalent service to all its customers.[74] Because this regulatory mechanism would

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[72] *Id.* at 381-83. AT&T went on to say that "[t]he speculative possibilities inherent in the term "satellite communications" would doubtless capture the imagination of some investors. This interest would also be heightened by the potent fact that the new corporation would be instrument chosen by the Commission to establish and operate the system."

[73] *1962 Senate Judiciary Hearings - Part 2* at 333 (statement of Bernard Stossburg, Assistant Chief, Common Carrier Bureau, FCC).

[74] The carriers' carrier concept also was seen as key to the vigorous development of intermodal competition to AT&T's existing submarine cables. *See, e.g., id.* (statement of Herman Schwartz, Assistant Counsel for the Minority, Senate Subcomm. on Antitrust and Monopoly Senate Comm. on the Judiciary) (explaining that the concept supports "the possibility of developing some kind of competition in that wholesale function which AT&T. largely performs now. A.T.&T. leases its international cable; it leases its domestic long lines to other carriers, many of whom are therefore dependent upon A.T.&T. It is that kind of

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not operate as lawmakers intended if direct access were implemented, any agency order to that effect would violate the Satellite Act..

* * *

The overall structure of the Act and its legislative history make clear that Congress understood that the entity it would create—no matter what corporate or governmental form was adopted—would operate as sole provider of services, and should be subject to particular safeguards governing the manner in which it provided satellite capacity to its customers. This understanding permeates congressional deliberations over the statute and, as detailed below, led lawmakers to adopt the Kennedy Administration proposal over the other alternatives.

### 5. Because the U.S. Participant would have exclusive access to the first satellite system, Congress rejected proposals to make a consortium of existing U.S. international carriers the direct operator of the U.S. portion of the system

As noted above, a leading rival to the Kennedy Administration's proposal for a new, private and independent U.S. entity to offer satellite services was the notion of a consortium to be formed by the then-existing U.S. international carriers. Lawmakers soundly rejected it, however, largely because they feared that this consortium concept carried too much risk that the then-dominant carrier, AT&T, could take effective control of satellite capacity in the United States and either thwart its development—which posed a threat to AT&T's own submarine cable facilities—or use the new technology to drive its weaker rivals from the

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dependence and that kind of economic power which we would like to see diluted by use of the satellite to obtain competition on the wholesale level.").

field.[75] Those fears have revived resonance under the current proposal for Level 3 direct access, which could afford the large U.S. carriers new opportunities to protect their current cable investment by adversely affecting the pace of INTELSAT privatization.[76]

The carrier consortium idea grew out of a Commission proceeding launched in early 1961, shortly before President Kennedy made his proposal public.[77] In response to a collective suggestion from the carriers themselves, the FCC initially recommended carrier ownership of the new satellite entity in the form of a joint venture.[78] The agency's proposal was introduced

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[75] International record carriers ("IRCs") such as Western Union were particularly concerned at this time about AT&T's potential to eclipse them in the emerging market for data transmission services—and, in this context, especially feared what might become of the new broadband technology to be offered by the first global system.

[76] *See* Statement of Professor Jerry R. Green and Hendrick S. Houthhakker, Harvard University, and Johannes P. Pfefenberger, The Brattle Group, *An Economic Assessment of the Risks and Benefits of Direct Access to INTELSAT in the United States* ("Brattle Group Analysis") (attached as App. 3).

[77] *See* Authorization of Commercially Operable Space Communications Systems, 26 Fed. Reg. 6787 (1961). The FCC ordered the international carriers to organize a special committee to formulate plans for the development, ownership, and operation of a commercial communications satellite system. This led to creation of the so-called Ad Hoc Carrier Comm., consisting of AT&T and eight other international carriers—American Cable & Radio Corp.; Hawaiian Telephone Co.; Press Wireless, Inc.; Radio Corp. of Puerto Rico; RCA Communications, Inc.; South Porto Rico Sugar Co.; Tropical Radio Telegraph Co.; and Western Union Telegraph Co. The carriers recommended that the U.S. portion of the system be owned by a non-profit closed corporation, which in turn would be wholly owned by the carriers. Report of the Ad Hoc Carrier Comm., Docket No. 14024 (filed Oct. 12, 1961), *reprinted in Space Satellite Communications, Part 2: Hearings before the Senate Subcomm. on Monopoly of the Senate Select Comm. on Small Business,* 87th Cong., 1st Sess. 669 (1961) ("*1961 Small Business Hearings - Part 2*"). The carriers' proposal amounted to the creation of a "housekeeping organization" for the carriers, which would be the real investors in the global system. *1961 Senate Small Business Hearings - Part 2* at 602 (Statement of Sen. Gordon); *accord id.* at 565-67 (statement of Assistant Attorney General Loevinger) (assessing the Ad Hoc Comm. proposal as creating a "central office").

[78] *See, e.g. 1962 Senate Commerce Hearings* at 62-63 (statement of Newton N. Minow,

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in Congress under several bills, any one of which would have placed the U.S. interest in the global system in a corporation wholly owned by the carriers.[79]

But Congress—despite aggressive lobbying by the carriers—rejected proposals for direct carrier ownership or control of the new venture. The reasons articulated in the legislative history bear directly on the legality of direct access now, for the consequences that concerned members in the 87th Congress could essentially come to pass today under the Commission's current proposal: retail carrier domination of the system's services and development.[80] Thirty-six years ago, lawmakers feared that the carrier consortium would allow AT&T to use its vast market power in the domestic and international communications markets to control the entire group—and thereby control the future of the global satellite venture itself.[81] Members of Congress rejected carrier ownership out of both concern for the potential for anticompetitive collusion among the intermodal competitors to then-nascent

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FCC Chairman).

[79] S. 2650, 87th Cong., 2d Sess. (1962); H.R. 9696, 87th Cong., 2d Sess. (1962); H.R. 10104, 87th Cong., 2d Sess. (1962).

[80] *See* Brattle Group Analysis at 17.

[81] *1962 Senate Space Hearings* at 351-52 (statement of Sen. Kefauver); *id.* at 417 (testimony of David C. Williams, Director of Research and Education, Americans for Democratic Action); *1962 House Commerce Hearings* at 570 (testimony of Hon. Robert F. Kennedy, Attorney General, Department of Justice); *1962 Senate Foreign Relations Hearings* at 118 (statement of Sen. Russell B. Long). *1962 Senate Judiciary Hearings - Part 2* at 349 (statement of Sen. Russell B. Long); *id.* at 458-65 (testimony of Samuel Barr, Vice-President, Western Union Telegraph Co.).

satellite technology[82] and fear that AT&T would skew usage of the U.S. portion of the global system in its own favor.[83]

Lawmakers were keenly aware that AT&T then held a nearly 90% share of the U.S. international market (including 100% of the voice market) and had a long history of competitive abuses.[84] They also were aware that U.S. regulators had experienced significant difficulty in attempting to restrain AT&T from obtaining and exercising its *real economic* monopoly power in its existing markets.[85] Many members of Congress objected to the notion that, "[i]n effect, AT&T. would be the chosen instrument of the U.S. Government to own and control civilian space communications to the detriment of the public interest."[86] As the Chairman of the House Science and Astronautics Committee put it,

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[82] *See id.* at 142 (statement of Assistant Attorney General Lee Loevinger) (joint ownership by the carriers would violate the antitrust laws); *id.* at 348 (statement of Sen. Russell B. Long).

[83] *See, e.g., 1962 Senate Space Hearings* at 351-52 (statement of Hon. Estes Kefauver, Senator from Tennessee); *1962 House Commerce Hearings* at 570 (testimony of Attorney General Kennedy).

[84] *1961 Science and Astronautic Hearings - Part 2* at 728 (statement of Rep. William Fitts Ryan).

[85] *1962 House Commerce Hearings* at 597 (statement of Rep. Celler).

[86] *See, e.g., 1962 Senate Judiciary Hearings -Part 1* at 130 (statement of Rep. Celler) (also stating that "A.T.&T. has been boldly campaigning throughout the halls of Congress advocating that the communications companies should be the sole beneficiaries of the communications satellite system.... From AT&T's viewpoint, this campaign is quite understandable. This would mean that A.T.&T. would have a dominant and very probably a monopoly position in ownership and operation of the space communications system."); *1961 Senate Small Business Hearings - Part 1* at 519 (statement of Sen. Russell B. Long) (noting concern about effect of AT&T ownership in the context of the foreign relations struggle between the U.S. free enterprise system and the U.S.S.R. communist system); *1962 Senate Judiciary Hearings -Part 1* at 130 (statement of Rep. William Fitts Ryan) (opposing a corporation that would "be dominated by A.T.&T., the greatest monopoly in our Nation

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> Now, if the international communications systems are the only ones that are going to be involved, since American Telephone & Telegraph Co. so overshadows the others in assets, in importance, in prestige, it would mean, in essence, that the American Telephone & Telegraph Co. would dominate this situation....And, therefore, since the American Telephone & Telegraph Co., which would dominate the situation, monopolize the situation because of their power and potency, that would be bad, then. That is the inescapable conclusion, is it not?[87]

The lawmakers' concern was more than just a fear about big companies generally. AT&T control of the global system posed a special threat because that company also controlled the leading alternative mode of intercontinental communications—undersea cables.[88] Control of both alternatives might create an incentive to retard the development of the global system.[89] Attorney General Kennedy testified that

> [u]navoidably the satellite system will compete with, as well as supplement, existing facilities. This creates a possible conflict of interest with respect to both the speed and the expansion of the satellite system, for it would be only natural for A.T.&T. to consider in its policies the extent to which speedy expansion of satellite facilities would make obsolete facilities in which it now has huge investments.[90]

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today" and "be immune to any meaningful regulation"). Although Congressman Ryan opposed creation of a private corporation altogether, his assessment of the likelihood of domination by AT&T was shared by Deputy Attorney General Katzenbach. *See Senate Commerce Hearings* at 50 (testimony of Nicholas deb. Katzenbach, Deputy Attorney General, U.S. Department of Justice) (stating that carrier ownership means domination by AT&T).

87 *1961 House Science and Astronautic Hearings - Part 2* at 882.

88 The other alternative mode of telecommunication, then as now, was high frequency ("HF") radio, but HF radio was vastly inferior to cable technology and to what satellite technology soon would achieve.

89 *1962 Senate Judiciary Hearings - Part 1* at 176 (statement of Rep. William Fitts Ryan).

90 *1962 House Commerce Hearings* at 565, 570 (testimony of Attorney General Robert F. Kennedy). *See also 1961 Small Business Hearings - Part 1*, at 51-54 (statement of Assistant Attorney General Lee Loevinger. *1962 Senate Space Hearings* at 460 (statement of Deputy Attorney General Katzenbach) ("A corporation owned and controlled entirely by existing

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Lawmakers understood this concern[91]—and AT&T's business rivals shared in it as well. Because this issue was of central import in 1962, the statute was drafted specifically to address it; that AT&T is no longer deemed a dominant carrier does not alter the design and operation of the Act as a legal mandate.

In addition, Congress rejected the carrier consortium proposal because lawmakers worried that the concept would allow carriers to engage in collusive practices—in regard to both the satellite venture and their other lines of business—that would redound to the ultimate injury of users of communications services. The Justice Department's antitrust specialist testified that "[t]he possibility would always exist that such ownership would result in limiting competition among the carriers in the furnishing of communication services, in the manufacturing and sale of communication equipment, or in limiting competition in either of these arenas of nonparticipating companies."[92] AT&T's rivals testified similarly.[93]

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communications companies, with their vast investment in present equipment unavoidably has a possible motivation to lag in the development and actual use of means for making their present equipment obsolete.").

[91] *See, e.g., 1961 Senate Small Business Hearings - Part 2* at 557-88 (statement of Sen. Long) ("If they are both owned by the same corporation then the new service, even though it may be far more efficient when it is developed, would have to carry the expense of all of the old equipment that had been invested in prior services; would it not?... [T]his new satellite [system] does give cause for consternation to at least some of those who have heavy investments in modes of communication that might prove to be less efficient in the future, does it not?"); *1962 Senate Judiciary Hearings -Part 1* at 15-16 (statement of Sen. Yarborough).

[92] *1962 Senate Judiciary Hearings - Part 2* at 142 (statement of Assistant Attorney General Loevinger).

[93] *1961 House Science and Astronautic Hearings - Part 2* at 880 (testimony of Western Union Telegram Co.) ("Western Union is opposed to any single common carrier setting up a
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Attorney General Kennedy contrasted the pitfalls of the carrier consortium proposal against the Administration's call for a new, independent private company to offer services:

> The administration places great importance on competition because the communications industry is particularly susceptible to domination by one company—A.T.&T.—and this possibility could extend to this proposed corporation.
>
> A satellite corporation dominated by A.T.&T. would, despite other provisions, not have the same interest in promoting and guaranteeing nondiscriminatory use and equitable access to the system by competitors as would an independent corporation.
>
> We can seek to maintain such access by law and regulation. We can attain it more certainly by an *independent corporation interested in sales to all carriers and not in protecting another aspect of its own separate activities.*[94]

Congress's rejection of the carrier consortium concept also was grounded in lawmakers' interest in creating a competitive force to break AT&T's dominance in facilities-based transoceanic services. They hoped that "[a]n independent satellite corporation ... would bring competing facilities [for AT&T-owned submarine cables] into the picture, perhaps lowering rates and improving service.[95]

Yet another objection to the carrier consortium proposal was its failure to provide other Americans with the opportunity to help finance the government-chartered entity—and

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satellite system in which the carrier owns all or a major part of the system, such as the plan advocated by AT&T. Domination by AT&T would in effect be a monopoly with respect to not only telephone but also record satellite communications.").

[94] *1962 House Commerce Hearings* at 565 (testimony of Attorney General Kennedy) (emphasis added).

[95] *1962 Senate Judiciary Hearings -Part 1* at 178 (statement of Rep. William Fitts Ryan).

potentially reap the benefits should the venture succeed.[96] As noted *infra*, lawmakers felt that providing for a wider ownership pool was the best way to build upon existing research and development efforts while also ensuring that the satellite system would be launched promptly and operated successfully.[97]

This review of lawmakers' rejection of the carrier consortium proposal has clear significance here. The 87th Congress explicitly refused to permit carriers such "direct access" to the as-yet-unbuilt system because lawmakers believed that carrier consortium would afford these retail entities both the incentive and the means to make anticompetitive use of the system's capacity and the leverage to determine the system's future. A Commission order authorizing direct access would give COMSAT's current customers the power that Congress intended to deny them.

### 6. Because the promise of an exclusive franchise on access to the first global satellite system would attract private capital to finance the venture without taxpayer dollars, Congress rejected proposals for establishing a new government agency to own and operate the U.S. portion of the system

At the other end of the spectrum from carrier ownership, bills introduced in the House and the Senate sought to establish a government-owned corporation to serve as the U.S.

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[96] *See, e.g., 1962 Senate Space Hearings* at 459 (testimony of Deputy Attorney General Katzenbach); *1961 Small Business Hearings - Part 1* at 415-16 (statement of Sen. Long).

[97] *Supra*, Section I.D.2, notes that Congress determined that the Administration's proposal properly addressed this issue because it allowed individual citizens to reap gains based on the government's input if those citizens took the further risk of investing their personal capital. Moreover, broad-based ownership also was designed to act as another check on potential anti-competitive activity by the carriers.

participant in the global system.[98] Congress rejected this proposal, however, largely because the majority believed that only a private, profit-oriented entity could successfully launch and operate the system in a rapid and efficient fashion.

Proponents contended that the benefits of "this great natural resource" would be made available on nondiscriminatory terms only if a government agency offered the satellite services.[99] As noted above, supporters of these bills also argued against the creation of "a private monopoly"—particularly one dominated by AT&T:

> [I]f the technical monopoly which the communications satellites confer be publicly owned, the organization and business aspects of the daily handling of traffic can be kept competitive between the major carriers. If private monopoly of the satellites is created, private monopoly of all our communications common carriage is inevitable. That private monopoly would be dominated in one way or another by the Bell System.[100]

Congress rejected the proposals for a government agency for reasons that also bear on the Commission's current proposal for direct access. First, most lawmakers simply shared the traditional U.S. preference for relying on free enterprise to provide telecommunications services.[101] And in this instance, they had a particular interest in using the new satellite system

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98 S. 2890, 87th Cong., 2d Sess. (1962); H.R. 10629, 87th Cong., 2d Sess. (1962).

99 *1962 Senate Judiciary Hearings -Part 1* at 76. *See also* 1962 Senate Commerce Comm. Report at 51 (minority views of Senators Yarborough and Burnett).

100 *1962 Judiciary Hearings -- Part 1* at 200 (statement of Dr. Dallas W. Smythe, Research Professor of Communications, Institute of Communications Research, University of Illinois, Urbana, Ill.).

101 *See, e.g.*, Staff of the Committee on Aeronautical and Space Sciences, Communications Satellites: Technical, Economic, and International Developments, 87th Cong., 2d Sess. 45 (Comm. Print 1962) (stating "majority view" favors private enterprise partly because of the "technological know-how of some of the Nation's largest companies and their willingness to invest millions of dollars in the venture"). That preference was shared by both the Kennedy

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as an opportunity to show other nations the benefits of the free enterprise system over government control of communications facilities.[102]

On a more pragmatic and pressing level, lawmakers also chose to avoid dipping into the U.S. Treasury to develop, launch, and operate the global system. A NASA spokesman representing the Kennedy Administration explained that the Executive Branch was "pretty confident" that private individuals would invest in the venture—but that "[w]e also are not sure how much the Congress would appreciate [the financial opportunity], if it were a Government monopoly."[103] Questions also were raised about the government's ability to do the work expeditiously and efficiently.[104]

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Administration and the Commission. *See, e.g., 1962 House Commerce Hearings* at 401 (testimony of Newton N. Minow, FCC Chairman) (noting that while the Administration's proposal and the carrier consortium concept comport with "the principle set forth in the President's policy statement of July 24, 1961—reliance on regulated private enterprise," the government-ownership measures "would alter this traditional philosophy by entrusting the accomplishment of our objectives to a wholly owned Government corporation. We think that the advantages of regulated private ownership are manifest."); *1961 House Science and Astronautic Hearings - Part 1* at 499 (FCC noting that its satellite-related activities through 1961 "reflected our conviction that such systems will and should take their place within the framework of our free enterprise system, under which public communications facilities are owned and operated by private companies subject to Government regulation").

[102] *1962 Senate Foreign Relations Comm. Hearing* at 188 (noting the "importance of exporting to the underdeveloped areas of the world the American system of freedom and its ideals" before Russia exported "her enslaver philosophy of communism").

[103] *1962 Senate Judiciary Hearings -Part 1* at 34, 51 (noting that private ownership offered a "greater chance ... of getting substantial amounts of funds.").

[104] *See, e.g.*, Staff of the Committee on Aeronautical and Space Sciences, Communications Satellites: Technical, Economic, and International Developments, 87th Cong., 2d Sess. 45 (Comm. Print 1962)

Finally, many members of Congress thought it was appropriate to afford all Americans a chance to invest in the risky venture—and obtain the benefits in such investment if the global system succeeded. Attorney General Kennedy testified that the Administration was "interested in the free enterprise system. That is what has been effective."[105] In response to criticism from Senator Kefauver, the sponsor of that chamber's proposal for a government-owned satellite entity, another Administration representative explained that the President's proposal was designed to ensure that "[t]he entire country will get the [financial] benefit" from the establishment of a private, independent provider of satellite services with broad-based stock ownership:

> First, from the research and development that has gone into not only the rocketry but also into the development of the satellites themselves, all the electronic breakthroughs and accomplishments in that area, there flows a net gain even if you never got into a communications system.
>
> Second, the company, if it does operate and operate successfully, will be expected to pay taxes....
>
> Third, there would be the opportunity for all taxpayers, if they wish, to purchase stock and to get return from dividends and capital gains on the stock investment.[106]

All of these concerns—but particularly the expectation that private enterprise was better able to launch and operate the global system in a timely and efficient fashion—convinced lawmakers that establishing a new government agency would be a poor choice.[107] Instead,

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105 *1962 House Commerce Hearings* at 573 ("We feel that everybody who wants to and can invest in this company should be permitted to invest.").

106 *1962 Senate Judiciary Hearings - Part 1* at 35.

107 *Compare 1962 House Commerce Hearings* at 567 (testimony of Attorney General Kennedy) ("We believe that the general public ... should be given an opportunity to invest and that investment will protect the public interest and *promote the speedy realization* of this program.") (emphasis added).

Congress chose to create a profit-oriented entity with widely diverse ownership because the enticement of profits to be made through COMSAT's exclusive service franchise would help to achieve lawmakers' goals most quickly, while also serving over the long run to protect the independent development of the new technology. By eliminating COMSAT's exclusive right to offer INTELSAT services, the proposal set forth in the *Notice* would eviscerate shareholders' legitimate expectations of financial rewards which Congress considered key to the global system's development.

### B. The language, structure, and context of the Satellite Act vest COMSAT with the exclusive franchise to provide INTELSAT services to U.S. users

When Congress eventually elected to enact the bill "designed to carry out" President Kennedy's proposal for a new, private and independent corporation to provide the first commercial satellite services to U.S. users, lawmakers made a thoughtful and deliberate choice between the two extremes of carrier ownership and government ownership. [108] As the legislative history indicates, all three options had been exhaustively explored. Congress concurred with the President that, "as a matter of national policy[,] private ownership and operation of the U.S. portion of the global system" would best suit the United States—as long as the U.S. portion was exclusively assigned to COMSAT, the

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[108] Report of the House Comm. on Interstate and Foreign Commerce, Communications Satellite Act of 1962, H.R. Rep. No. 1636 87th Cong., 2d Sess. at 7 (1962) ("1962 House Interstate and Foreign Commerce Comm. Report"). *See* S. 2814, 87th Cong., 2d Sess. (1962); H.R. 10115, 87th Cong., 2d Sess. (1962); H.R. Res. 11040 (1962) (ultimately adopted as the Satellite Act).

only corporation governed by the Satellite Act's directives and safeguards.[109] The Commission, therefore, has no authority to alter this statutory scheme.

Carriers at the time certainly understood what the Kennedy Administration's proposal would do and protested it vigorously: "The establishment of a new company to own and operate the satellite links would have the effect of depriving the international common carriers of direct ownership and control of the facilities which they use to discharge their obligation to serve the public."[110] That, of course, was precisely the point—Congress intended to ensure that carrier ownership interests in the new system could not be wielded to retard satellite

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[109] 1962 House Interstate an Foreign Commerce Comm. Report at 7. The legislative history makes clear that lawmakers expected and intended that the new entity would be the exclusive provider of services via the global system—and therefore devised several mutually reinforcing safeguards to govern that provision of service. Administration witnesses testified repeatedly before Congress as to the measures included in the Kennedy proposal to protect the competitiveness of the U.S. marketplace. *See, e.g., 1962 Senate Space Hearings* at 401 (Testimony of Deputy Attorney General Katzenbach) (noting that the Justice Department worked to provide for what competition "there can be" while also protecting the independent operation of the new corporation); *1962 Senate Judiciary Hearings - Part 1* at 60 (Testimony of Deputy Attorney General Katzenbach) (listing the proposal's explicit competition provisions and safeguards and calling them "an awfully good example of trying to encourage competition"); *id.* at 144 (Testimony of Lee Loevinger, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice) (responding to questions concerning "a corporation which owns the only satellite communications system ... *[and] will be sole supplier of the particular services involved*" by saying "*in the sense that a single enterprise will conduct all of the operations within this system, that enterprise is itself a kind of monopoly. However, there is a vast difference between what the administration is proposing and supporting here and some of the other proposals that have been made*") (emphasis added). The thrust of the testimony is that the drafters considered all aspects of the global system in which competitive issues arose, and devised explicit mechanisms to address them while also bestowing the exclusive service franchise on COMSAT.

[110] *1961 House Science and Astronautic Hearings - Part 1* at 381 (Testimony of James E. Dingman, Vice President and Chief Engineer, AT&T).